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IN THE

Supreme Court of the United States

October Term, 1963.
No. 11.

NICO JACOBELLIS,
Appellant,

vs.

STATE OF OHIO,
Appellee.

On Appeal From the Supreme Court of the State of Ohio.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

As its recent national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

Nico Jacobellis v. State of Ohio is a motion picture film case of nationwide and historical importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of Facts.

Appellant, manager of the Heights Art Theater in Cleveland Heights, Ohio, was indicted by the County Grand Jury and convicted by a three-judge trial court for separate counts of "possession" and "exhibition" of the film "The Lovers." The trial court found the

film to be an obscene motion picture within the meaning of Section 2905.34 of the Ohio Revised Code. Appellant had waived his right to a trial before a jury, drawn from the county.

The holding of the trial court and the pertinent language in its opinion is set out below:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 U.S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers) has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film."

The appellant was sentenced to pay a fine of $500.00 on the "possession" count and $2000.00 on the "exhibition" count.

The trial court decision was affirmed by the three-judge district appellate court (3-0), and by the seven-judge highest court of the state (6-1), all of whom viewed the film on appeal.

Summary of Argument.

Having had a full hearing in the State Court, under *Roth* principles, appellant now seeks to upset this final judgment of the highest court in Ohio, by resurrecting the same issues firmly put to rest by this Court in the *Roth* decision, less than six years ago.

Amicus CDL contends that the judgment of the court below, except as stated in Point III of the Brief herein, is correct in every respect and should be affirmed. We contend that:

(1) The "scienter" provision of section 2905.34 of the Ohio Revised Code, as construed in the opinion of the Court below, is consistent with the "scienter" requirement announced by this Court in *Smith v. California*, 361 U. S. 147 (1959).

(2) The construction of section 2905.34 of the Ohio Revised Code, adopted by the Court below (that the phrase "knowingly possess" required the element of *mens rea*, namely, a guilty or wrongful purpose, and that the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition), is binding on this Court. A similar proscription was approved by this Court in *Alberts v. California*, 354 U. S. 476 (1957).

(3) The construction of section 2905.34 of the Ohio Revised Code, adopted by the Court below (that the phrase "'in his possession or under his control" required possession and control for the purpose of circulation or exhibition), describes a crime which is in the nature of an "attempt". A

successful "attempt" will not support two convictions.

(4) The remaining provisions within section 2905.34 of the Ohio Revised Code, which have no application to the facts of the present case, are not subject to review by this Court in advance of an actual controversy.

(5) The trial court, in finding the motion picture film, "The Lovers" obscene, applied proper constitutional standards (*i.e.*, the standards prescribed by this Court in *Roth v. United States* and *Alberts v. California (supra)*). Such standards do not contemplate involvements in "hard-core pornography" concepts or "clear and present danger" tests.

(6) The determination of obscenity is primarily an issue of fact. Constitutional review in this matter is limited to the question, "Whether reasonable minds could differ beyond a reasonable doubt that the motion picture film, 'The Lovers' is obscene."

ARGUMENT.

I.

The "Scienter" Provision of Section 2905.34 of the Ohio Revised Code, as Construed in the Opinion of the Court Below, Is Consistent With the "Scienter" Requirement Announced by This Court in Smith v. California, 361 U. S. 147 (1959).

A. The People's Burden of Proof on the Issue of "Scienter" Is "Knowledge of the Contents."

A classic case establishing "scienter" is one in which a defendant has *read* the book, *looked at* the picture, or as here, *viewed* the motion picture film, prior to offering the subject matter to the public for circulation or distribution. A person must take notice of what in this enlightened age, a community will deem to be obscene.[1] The prosecution need not prove as a part of their case that the defendant was aware of the tendency of his material when it is shown that he knows the contents.[2] This question was clearly decided by this Court some 67 years ago in *Lew Rosen v. United States*, 161 U. S. 606 (1896).[3] When a person knows

[1]This Court said in *Roth v. U. S.*, 354 U. S. 476, 490, fn. 28: "This Court, as early as 1896, said . . . : . . everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity, in social life, and what must be deemed obscene, lewd, and lascivious. *Rosen v. United States*, 161 U. S. 29, 42 . . ."

[2]Since under the law, obscene material is such because it can be said a reasonable person in the community would find it so, to permit exhibition of such material without penalty by a person who knows the content, is to permit that person to act unreasonably.

[3]"Undoubtedly the mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd or lascivious character, is not an offense under the statute if the person making the deposit was, at the time and in good faith, without

(is aware of) the content of the subject matter he offers for sale, he may not be heard to say, "I didn't know (subjectively) the film was obscene."

The draftsmen of the Model Penal Code of the American Law Institute state very clearly that under prevailing case law it is necessary only to prove that the defendant knew of the *presence* of the objectionable material and that it is not necessary to prove that a defendant was subjectively aware of the evil tendency of the material.[4] In another effort to alter[5] ruling

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knowledge, information, or notice of its content. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. . . . The indictment on its face implies that the defendant owned or managed the paper 'Broadway'. He admitted at the trial that he owned and controlled it. He did not pretend that he was ignorant at the time of the contents of the particular number that he caused to be put into the postoffice at New York. *The general charge* that he 'unlawfully, wilfully, and knowingly deposited and caused to be deposited in the post office . . . a certain obscene, lewd, and lascivious paper' — describing it by its name, volume, number, date of trademark, date of issue, and as having on it the name of Lew Rosen, proprietor, the same name borne by the defendant, — *may not unreasonably be construed as meaning that the defendant* was, and *must have been, aware of the nature of its contents at the time* he caused it to be put into the post office for transmission and delivery. . . ." *Rosen v. U. S.*, 161 U. S. 606, 607 (1896) (Our emphasis.)

[4] "14. Mens Rea: Presumptions of Knowledge or Purpose. Under prevailing obscenity laws, the prosecution must prove that defendant knew or, at least, was reckless as to the presence of objectionable material in a book or other publication disseminated by him. It does not have to prove that defendant was aware of the evil tendency of the material." American Law Institute, Model Penal Code, Tentative Draft No. 6, section 207.10 (1957), Reporter's Notes at page 49.

[5] The drafters also took a position contrary to the overwhelming body of case law authority on the issue of the respective functions of a court and jury in an obscenity trial. This was rejected by the Council of the American Law Institute. Compare the extensive annotation following *United States v. Limehouse*, 285 U. S. 426, entitled, "Respective Functions of Court and Jury in Determining Criminality vel non of

case law (in this case the ruling authority is the United States Supreme Court's decision in *Rosen, supra*), the 1957 draftsmen suggested certain presumptions against the defendant. At the same time however, the reporter's notes recognized the prevailing law of the land, at page 50:

> "Our recommendation may seem hard on the defendant unless one bears in mind that prevailing law is even rougher, absolutely precluding any defense[6] based upon defendant's misappraisal of the tendencies of his material. There is much to be said in favor of the present law. The issue of defendant's knowledge or recklessness of the prurient character of his material is likely to turn largely on the jury's acceptance or disbelief of his testimony as to his own state of mind. Some defendants will not take the witness stand so that they can't make the defense. When made it is hardly likely to be persuasive against the fact that the material is such as to be judged predominantly prurient by the reactions of ordinary men."

Matter", and the reporter's note 13 at page 46 of the 1957 draft. This "silent revolution", within the ALI, against the existing standards in ruling case law appears to have been spearheaded by the same justices which lead the attack in the court room. See fn. 50.

[6]In *Schindler v. U. S.*, 208 F. 2d 289 (9th Cir., 1953) the circuit court of appeals, citing *Rosen v. U. S. (supra)*, sustained the exclusion of evidence offered by defendant to show that he had consulted an attorney as to the propriety and lawfulness of distributing the allegedly obscene books. This type of bootstrap defense is irrelevant under *Roth v. U. S.* Obscenity is a factual issue and one "must take notice of what in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious." See footnote 1.

There is, however, no indication in the majority opinion in *Smith v. California*, 361 U. S. 147 (1959), that this Court viewed the common law "scienter" requirement of "knowledge of the contents," expressed in *Rosen v. U. S.*, *supra*, as inadequate or oppressive. In the *Smith* case, the same test, *"awareness of its contents"*, was regarded as the extent of the prosecutor's burden.[7] The *Smith* court regarded the common law precedent as *strictly* meeting the scienter requirement.[8]

Neither Justice Frankfurter's concurring, nor Justice Harlan's concurring and dissenting minority opinions in the *Smith* case give aid to appellant here. Both opinions viewed the defendant as having a constitutional right to introduce evidence bearing on *community standards* only as related to the issue of "obscenity".[9]

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[7]"It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard L. Rev. 1. *Cf. American Communications Association v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness* of its contents. The circumstances may warrant the inference that he was *aware* of what a book contained, despite his denial." *Smith v. U. S.*, 361 U. S. 147, 154 (1959). (Our Emphasis.)

[8]"Common law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of scienter. . . ." *Smith v. U. S.*, 361 U. S. 147, 153, fn. 9 (1957).

[9]Justice Frankfurter speaking in *Roth v. U. S.*, 361 U. S. 147, 165: "Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. U. S.*, 354 U. S. 476, 489, 1 L. Ed. 2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light

For those Justices to hold such evidence on "community standards" as constitutionally compelled, is not to say that they would alter the "scienter" requirement, or make of it a subjective test. To suggest that Justice Harlan would modify the "scienter" rule expressed in the *Rosen* case is unwarranted and patently illogical, in view of his expression in *Smith* that he *would not* strike down the Los Angeles City ordinance (though it lacked the requirement of "scienter"). He would have reversed the conviction and remanded the case for a new trial to permit the defendant to introduce evidence on *community standards*. Had his view been followed, the people would not have had any burden on the issue of "scienter".

Appellant's subtle argument, unmasked, is this: While reluctantly recognizing that the *Roth* decision is precedent and solid authority that the word "obscene" is not vague and does establish an ascertainable standard of guilt,[10] nevertheless, he resumes the attack

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to be shed on what those 'contemporary community standards' are . . . ."

Justice Harlan speaking in *Roth v. U. S.*, 361 U. S. 147, 172: "In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. . . . On this ground I would reverse the judgment below, and remand the case for a new trial . . ."

[10]"These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . 'boundaries sufficiently distinct for judges and juries fairly to administer the law. . . .'" *Roth v. U. S.*, 354 U. S. 476, 491 (1957) "In summary, then, we hold that *these statutes*, applied according to the proper standard for judging obscenity, *do not* offend constitutional safeguards against convictions based upon protected material, or *fail to give men in acting adequate notice* of what is prohibited . . ." *Roth v. U. S.*, 354, U. S. 476, 492 (1957). (Our emphasis.)

against *Roth* collaterally, by arguing that he cannot be convicted, because he *personally* does not "know" obscenity when he sees it.

B. The Test for "Scienter" Is Whether the Accused Knew or Should Have Known of the Obscene Nature of the Material Involved.

It can be said that an accused should have known of the obscene nature of the material involved where he was aware of the nature of the subject matter (in this case, knew the contents of the film), for a person must take notice of what, in this enlightened age must be deemed to be obscene.

Amici American and Ohio Civil Liberties Unions, hereinafter referred to as ACLU, argue for appellant in their brief at page 45 that this Court's grave concern "cannot be washed away in obscenity cases by a simple requirement that the accused know only the contents of the material involved. . . . Such a rule of *scienter* would be as great a deterrent to free expression as no *scienter* requirement at all. Under such a rule, the disseminator of ideas would be criminally liable regardless of his judgment, . . . regardless of the circumstances and factors existing at the time he made his judgment, and regardless of the complexity of the problem of making a judgment. He would guess wrong at his peril; . . ." (Emphasis theirs.)

But the conclusive answer to this suggestion was given by Justice Holmes:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may

he incur a fine or a short imprisonment, as here; he may incur the penalty of death."[11]

The law does not protect against such a hazard. The defendant must take notice of what in this enlightened age a community will deem obscene,[12] and of course he runs the risk of having a jury of his peers misjudge him.

This Court's holding in *Wieman v. Updegraff*, 344 U. S. 183 (1952), is not precedent for the "scienter" rule proposed by ACLU.[13] The question in that case was, "whether the due process clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, *regardless of their knowledge* concerning the organizations to which they had belonged."[14] That case does not suggest that a statute would be bad if the individual were required at the time of membership to have knowledge of the facts upon which the organization was adjudged to be subversive. In such a case he would not be heard to argue that in *his judgment* of the facts, the organization is not subversive and that, therefore, he does not have "knowledge". Appellant here *did have knowledge of all of the facts* upon which "The Lovers" was adjudged to be obscene. His poor judgment is no saving grace.[15]

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[11]Justice Holmes speaking in *Nash v. U. S.*, 229 U. S. 373, 377.

[12]See fn. 1.

[13]ACLU suggests a vague "subjective knowledge" as the test for "scienter". ACLU brief, page 44. Such a rule is decidedly against the social interest in order and morality and would operate as a guarantee to the amoral person that he could not be prosecuted.

[14]344 U. S. 183, 190.

[15]That his judgment was bad in the extreme is attested to by the findings of the three judges as triers of the fact and

C. The Scienter Provision of Section 2905.34 of the Ohio Revised Code, as Construed in the Opinion of the Court Below, Is Consistent With the "Scienter" Requirment Announced by This Court in Smith v. California, Supra.

The trial court specifically found in its memorandum opinion: "That the defendant acted unlawfully and knowingly in . . . exhibiting this motion picture film." *State v. Jacobellis*, 175 N. E. 2d 123 at page 125. The court below affirmed this ruling.[16]

There was ample evidence to support the findings that the appellant knew or should have known the

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the findings of the Ohio jurors in Montgomery County in *Ohio v. Warth*, 173 Ohio State 15, concurred in by the court below in 179 N. E. 2d 777, 781. (See also 179 N. E. 2d 772.)

[16]"The question, of course, is knowledge of what? It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved." *State v. Jacobellis*, 179 N. E. 2d 777, 779. "While the posessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under section 2905.34, Revised Code.

"Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section. . . ." *Ohio v. Jacobellis*, 179 N. E. 2d 777, 780. See also *Chobot v. Wisconsin*, 106 N. W. 2d 286, 291, appeal dismissed for want of a substantial federal question in 368 U. S. 15 (1961), Black, Douglas and Harlan were of the opinion probable jurisdiction should be noted.

film was obscene when he exhibited it.[17] Appellant promoted "The Lovers" in the local daily papers with a photograph which suggests sexual intercourse as the central theme and advertised it as such.[18] ("Conventions explode," "Contains one of the longest and most sensuous love scenes to be seen *in this country*" (our emphasis), "Something of a sexual revolution.") Prior to the exhibition on November 13, appellant read the film review by W. Ward Marsh of the Cleveland Plain Dealer which condemned the film as obscene.[19] At the time of the exhibition, the appellant knew the contents (had viewed the film) and since by the verdict of the fact finders, a reasonable man in the community would have considered it obscene, appellant, as a reasonable man, must have known the film was obscene.[20]

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[17]We consider here only the conviction for the crime of "knowingly exhibiting an obscene film." In our view the second count, "knowingly possess for the purpose of exhibiting" is an "attempt" crime and a conviction for a successful attempt will not support two convictions in the area of free speech. See Point III.

[18]See Answer Brief of Appellant, Appendix 13, 14, 15, 16 and 17.

[19]"The verdict here: a dull picture until it turns to screened pornography . . . Suppose for the moment I condone its pornographic sequences—which I do not!—there are other entirely distinctive moral issues which are almost as unacceptable, or will be unacceptable, to people who consider themselves as decent folk. . . 'The Lovers' lights every censorship torch. . . ." Review by W. Ward Marsh, as reproduced in Answer Brief of Appellant, page 4 and Appendix 18.

[20]"It may fairly be assumed that one who has reason to believe a fact exists, knows it. exists. Certainly if he be a reasonable being" Justice Strong speaking in 101 U. S. 557. Appellant's claim that the Bureau of Customs passed the film and that the film was shown in other cities is unavailing. There is abundant authority in this Court that administrative persons, bodies or agencies are not proper judges of community standards. See *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 (1963) and the 1958 *per curiam* reversals.

II.

The Construction of Section 2905.34 of the Ohio Revised Codes, Adopted by the Court Below (That the Phrase "Knowingly Possess" Required a Guilty or Wrongful Purpose and the Phrase "in His Possession or Under His Control" Required Possession and Control for the Purpose of Circulation or Exhibition) Is Binding on This Court. A Similar Proscription Was Approved in Alberts v. California, 354 U. S. 476 (1957).

From 1910 to 1939, Section 13035, General Code (now Section 2905.34, Revised Code) provided as follows:

> "Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession *for such purpose*, an obscene, lewd or lascivious book. . . ." (Our emphasis.)

In 118 Ohio Laws 420 (1939), the emphasized words were stricken and the words, "or has under his control," were inserted in their place. In 120 Ohio Laws 230 (1943), the word, "knowingly", was inserted after the opening word, "Whoever." In the same act, Section 13035.1, General Code (now Section 2905.35, Revised Code) was passed, providing for the issuance of search warrants for suspected violation of the preceding section and also providing for the disposition of articles seized under such warrants.[21] Without judicial interpretation, it could not be said what effect the combined change (*i.e.*, addition of the new language "or under his control," the deletion of the old language "for

[21] See *State v. Mapp*, 170 Ohio State 427, 435 (1960).

such purpose" and the addition of search warrant provisions) had on the "possession" crime.[22]

The majority in the court below, in construing the phrase "in his possession or under his control" and its relation to the rest of the section applied the doctrine of "noscitur a sociis" to the ambiguity and read an equivalent phrase "for the purpose of circulation or exhibition" back into the statute, and interpreted the "knowingly" element as having the element of *mens rea*, "a guilty purpose", as implied limitations on the "possession" crime.[23] Limitations by implication through statutory construction are not objectionable.[24]

The views of the court below, in respect to the above construction of the Ohio statute, are completely nonreviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court on appeal *must* accept the state court's construction of the statute and proceed to test the validity on that basis. *General Trust Company v. Blodgett*, 287 U. S. 509, 513; *Kingsley Pictures Corporation v. Regents*, 360 U. S. 684, 688.[25]

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[22]"Control" and "possession" have different meanings in criminal law. See the distinction drawn by Professor Rollin M. Perkins in the crime of larceny, Perkins on Criminal Law, The Foundation Press, Inc. (1957), 196, 199. The addition of "under his control" appears to have broadened the "possession" provision. Whether the omission of the words "for such purpose" was purposeful or inadvertent is not clear.

[23]Judge Taft in his separate opinion in the court below, thought the deletion of "for such purpose" by the Legislature in 1943, precluded reading an equivalent phrase back into the statute as did the majority opinion. Judge Taft's contrary interpretation does not appear to be required.

[24]In the obscenity area see *People v. Finkelstein*, 183 N. E. 2d 661, Petition for Writ of Certiorari denied in 9 L. Ed. 2d 100 (1962). Justice Douglas was of the opinion that certiorari should be granted.

[25]This Court said in the *Kingsley Pictures Corporation* case, involving New York's obscenity statute and the motion picture

The "possession" prohibition of Section 2905.34, as construed by the court below, requires proof that a person "knowingly (with guilt or wrongfully) possessed an obscene motion picture film for the purpose of circulation or distribution." An equivalent of this proscription[26] was upheld by this Court in *Alberts v. California*, 354 U. S. 476, 494 (1957).[27]

III.

The Construction of Section 2905.34 of the Ohio Revised Code, Adopted by the Court Below (That the Phrase "In His Possession or Under His Control" Required Possession and Control for the Purpose of Circulation or Exhibition) Describes a Crime Which Is in the Nature of an "Attempt." A Successful "Attempt" Will Not Support Two Convictions.

Whether or not the affirmance by the court below of appellant's conviction on the "possession" count was grounded upon a different and conflicting interpretation of the statute than that of the trial court[28] need

film "Lady Chatterley's Lover", at page 688. "We accept the premise that the motion picture here in question can be so characterized. We accept too, *as we must*, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis.)

[26]Under California Penal Code Section 311, to "wilfully and lewdly" keep for sale an obscene book was a misdemeanor. By judicial interpretation in California, a lewd intent might be inferred from knowledge where the evidence indicates defendant's knowledge of the character of the writing, etc. which he kept for sale. *People v. Wepplo*, 178 P. 2d 853, 857, 858.

[27]"The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material." *Alberts v. California*, 354 U. S. 476, 494 (1957).

[28]The trial court's ruling on appellant's demurrer [R. 12] established *only* that the "possession" count stated a crime.

not be decided.[29] The conviction on the "possession" count must be reversed for other reasons.

The court below construed the "possession" provision of Section 2905.34 to require more than mere possession, *i.e.*, knowing possession "for the purpose of circulation or exhibition." The court said: "He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and *acts* in furtherance thereof." (Our emphasis.) Under the construction placed on this portion of the Ohio statute, the appellant stands convicted of *an "attempt"*[30] *to exhibit* an obscene motion picture film, a statutory offense related to the "exhibition" offense. While both counts (the possession for the purpose of exhibition and the

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Appellant by pure hypothesis pyramids the trial court's citation of *Ohio v. Mapp*, 170 Ohio State 427, in its ruling on the demurrer, into an express holding of the trial judge that syllabus 1 (the opinion of three justices in the *Mapp* case (Justices Taft, Zimmerman and Peck) was ruling case law for the facts of *this* case. As to the remaining four justices of the Ohio Supreme Court, it should be noted that Justices Matthias and Weygandt did not concur in syllabus 1 and while Bell and Herbert concurred in syllabus 1, those justices in their separate opinion at page 437 *limited their concurrence to the facts of the Mapp* case, "I would hold no brief for the defendant here *if the evidence had disclosed* a commercial purpose. . . ." (Our emphasis.) The most that appellant could expect from this argument is a determination whether appellant possessed the film *for circulation*, which the "exhibition" count conclusively established. Compare this situation with the result in *People v. Finkelstein*, 183 N. E. 2d 661, 662 (1962), certiorari denied by this Court 9 L. Ed. 2d 100 (1962), in which the New York Court of Appeals implied "scienter" into the New York obscenity statute in reviewing a court conviction. ("scienter" was not considered as an element of the crime in the trial court.)

[29]The "possession" count was good however. See Point II.

[30]A criminal attempt is an attempt to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bishop on Criminal Law, Section 728.

exhibition count) are good,[31] and the appellant may be convicted of either,[32] he may not be assessed a double penalty where he stands convicted of both. A successful attempt to commit a crime will not support two convictions and penalties—one for the attempt and the other for the completed offense.[33]

IV.

Those Provisions of Section 2905.34 of the Ohio Revised Code Which Have No Application to the Limited Facts in This Appeal, Are Not Subject to Review by This Court in Advance of an Actual Controversy.

Appellant has no standing to attack the provisions of Section 2905.34 which are unrelated to the factual situation presented herein. That this Court will not inquire into the constitutionality of a state statute in the abstract[34] (without reference to its application to the

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[31]This is in disagreement with the argument of ACLU in their brief at page 59 where they say, "Nor can it be reasonably claimed that to put mere possession *outside* the realm of punitive activity seriously hampers the state in its efforts to control traffic in pornography." (Our emphasis.) This Court approved the proscription of "possession for the purpose of circulation" in *Alberts v. U. S.*, see footnote 27.

[32]Perkins on Criminal Law, The Foundation Press Inc. page 477 (1957).

[33]For a discussion of this principle in a federal case, see *Prince v. U. S.*, 352 U. S. 322 (1957).

[34]"This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v.

facts in a particular case) is a natural corollary to the rule that this Court, on appeal, must accept the state court's construction of its statute and proceed to test its validity on that basis. *Kingsley Pictures Corporation v. Regents, supra.*

A statute which does not offend due process when considered with the interpretation involved and the facts at hand, may receive different treatment than a like statute which does not have the same effect when broadly construed by a state court. That free speech and expression may be involved does not change this result.[35]

Commissioners of Immigration, 113 U. S. 33, 39. *Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U. S. v. Wurzbach, 280 U. S. 396." United States v. Raines*, 362 U. S. 17, 21 (1960). (Our emphasis.)

[35]Compare the California obscenity statute in *Smith v. California*, 361 U. S. 147 (1959) with the New York obscenity statute in *People v. Finkelstein*, 183 N. E. 2d 661, cert. den. 9 L. Ed. 2d 100 (1962) and the results reached in those cases. But more in point, compare the Michigan statute in *Butler v. Michigan*, 352 U. S. 380 (Feb., 25, 1957) with the Florida statute in *Matthews v. Florida*, 98 So. 2d 568 (Nov. 27, 1957), petition for certiorari denied by this Court in 356 U. S. 918 (1958) and the results reached in those cases. The Michigan statute read: "Any person who shall . . . sell . . . any book . . . containing obscene . . . language, or obscene . . . pictures . . ., tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of the youth . . . shall be guilty of a misdemeanor." Held to violate due process where the sale was to an adult. *Butler v. Michigan*, 352 U. S. 380. The Florida statute read: "Whoever . . . exhibits . . . any book or . . . other thing . . . containing obscene language . . . or any obscene . . . pictures or descriptions manifestly tending to the corruption of the morals of youth shall be punished by imprisonment in the state prison. . . ." (Felony.) Held, where exhibition was to a 12-year old girl, jury conviction affirmed by Florida Supreme Court (4 to 2), in a *per*

V.

The Trial Court, in Finding the Motion Picture Film "The Lovers" Obscene, Applied Proper Constitutional Standards (I.e., the Standards Prescribed by This Court in Roth v. United States and Alberts v. California). Such Standards Do Not Contemplate Involvements in "Hard-Core Pornography" Concepts or "Clear and Present Danger" Tests.

Having had their full day in the state court, under *Roth* principles, appellant and ACLU now seek to upset this final judgment of the highest court in Ohio, by resuming their 1957 attack and reopening for argument the same questions firmly put to rest by this Court less than six years ago in the *Roth* decision. ACLU concede in their brief, that "the explicit basis for the instant conviction is the Court's holding in *Roth v. United States*, 354 U. S. 476."[36] Appellant did likewise in the court below, in urging that the Ohio Supreme Court reject the Roth test as unconstitutionally vague, impractical and unworkable.[37]

If this appeal is to be placed in its proper perspective, one should ask what the review on the issue of "obscenity" might be, had the verdict of the fact finders been for the exhibitor appellant, and an appeal been

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curiam decision without opinion in 98 So. 2d 568 (Nov. 27, 1957), cert. den. by this Court in 356 U. S. 918 (1958). While it may be suggested that in the Florida case the constitutional question was not properly raised in the trial court, two dissenting justices in the Florida Supreme Court thought the *Butler* decision controlling.

[36]ACLU Brief, page 5. It could hardly be claimed otherwise in view of the language of the trial court. See Statement of Facts at page .... of this brief.

[37]See Appendix 10 in appellee's Motion to Dismiss Appeal.

taken by the people, claiming that the verdict was wrong as a matter of law.[38]

Since this Court's landmark decision in *Roth*, two principal attacks have been made on the obscenity statutes: (1) that the obscenity statutes are subject to the clear and present danger test, and (2) that the obscenity statutes' proscription extends to "hard-core pornography" only. Both are grounded upon a claim that the present Roth standards are unconstitutionally vague, impractical and unworkable. Appellant and ACLU make both attacks in this appeal.

A. "Clear and Present Danger" Is Inherent From the Definition of Obscenity and Is Not a Separate Fact to Be Proved by the People.

ACLU's probe for the clear and present danger test[39] as an additional burden of proof for the people's case is in complete disregard of all constitutional precedent, both remote and modern.[40] Justice Brennan

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[38]Or "Constitutional fact."

[39]ACLU Brief, page 6: "There is no evidence in the record that the motion picture involved in this case presents such a clear and present danger; in addition, we believe that, 'under the current state of knowledge' there is grossly insufficient evidence to show that obscenity brings about *any* substantive evil." (Their emphasis.)

[40]See Judge Learned Hand's opinion in *United States v. Rebhuhn*, 2nd Circuit, 109 F. 2d 512, 514, cert. den.; *Rebhuhn v. U. S.*, 310 U. S. 629 (1940); see also *Rosen v. U. S.*, 161 U. S. 29. A unanimous court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571 (1941), said: "There are certain *well defined* and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which *by their very utterance inflict injury*. . . ." (Our emphasis.) Justice Frankfurter delivering the majority opinion in *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1951), said the following about the clear and present danger: "Libelous utterances, not being within the area of constitutionally protected

speaking for this Court could not have answered that challenge more fully than in *Roth v. United States* at page 486:

> "The complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois, supra* (343 U. S. at 266): . . . . it is unnecessary either for us or for the state courts, to consider the issues behind the phrase 'clear and present danger.' *Certainly no one would contend that obscene speech,* for example, *may be punished only upon a showing of such circumstances.* . . ." (Our emphasis.)

ACLU nevertheless argues: "There is no evidence in the record that the motion picture film involved in this case presents such a clear and present danger; in addition, we believe that, under the current state of knowledge, there is grossly insufficient evidence to show that obscenity brings about *any* substantial evil." (Their emphasis.)

The complete answer to this, is this Court's expression in *Chaplinski v. New Hampshire,* 315 U. S. 568, 571 (1941), that the "lewd" and the "obscene" *by their very utterance inflict injuries,*[41] and in *Roth v. United States,* where this Court declared that the "lewd" and the "obscene" were inherently evil and by definition contrary to the social interest in order and morality.[42]

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speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase, 'clear and present danger'. *Certainly no one would contend that obscene speech,* for example, *may be punished only upon a showing of such circumstances.* . . ." (Our emphasis.) Justice Brennan reiterated this answer in *Roth v. U. S.,* 354 U. S. 476, 486 (1957).

[41] See Footnote 40.

[42] *Roth v. U. S.,* 354 U. S. 476, 485. In the words of Professor Hocking: "A published obscenity is not an idle mental image—

This universal understanding[43] is recognized by all but those who choose to disregard the lessons of history.[44] Their continuing attack clings to the *Roth* dissent that obscenity (expression) really is not punishable, only criminal action is.[45]

Can it be seriously argued that this Honorable Court does not have the power to punish expression, when other interests, including the safety of our culture, point to an overriding importance? Rule 40.5 of this Court reminds attorneys practicing before this Bar that briefs *must be free from scandalous matter* and that, as a penalty for failure to observe this restriction, the *briefs* may be *disregarded* and *stricken* by the Court. Further,

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it is a disruptive mental image, a violent displacement of the self-sense of the viewer from the region of active purpose to the region of bodily preoccupation; it intrudes upon the eye what is normally in the province of touch and concealment; it begins a psychological disintegration." William E. Hocking, Freedom of the Press (Chicago; University of Chicago Press, 1947), pages 122.

[43]See *Roth v. U. S.*, at 485: "This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956 . . ."

[44]"The effect of such 'literature' is to dull the moral sensitivity of many, if not most, of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetites and cast aside decent standards of behavior." *People v. Williamson*, 24 Cal. Rptr. 734, 737 (Nov. 21, 1962).

[45]See Justice Douglas' dissent in *Roth*, at page 512: "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (Emphasis his.)

it is reasonably certain that this Court will not permit an intrusion on its culture in the form of offensive expression, in open argument.

Certainly the generalities of *Winters v. N. Y.*, 333 U. S. 507 (1948) and *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684 (1959), cited in ACLU's brief at page 15, are limited to the statutes and interpretations involved and are not authority for their proposition, "that an author should not be punished if he chooses to expound his ideas through the use of 'obscenity'." By definition "obscenity" appeals to lustful interests and emotions. It does not contain ideas of value. It is not in the competitive market place of ideas. It contributes nothing in the search for truth or the development of civilization. In the expression of an idea in the community, obscenity may not be resorted to, any more than scandalous matter may be utilized in argument before this Court. The dignity of the community is no less important than the dignity of this Court. Our culture can and does require that such matters be circulated in appropriate garb.

Unwilling to acknowledge the healthy mantle of precedents which has enriched our heritage, ACLU reaches back into the past (1859) for supporting authority, John Stuart Mill, yet allows no discount for contemporary problems of mass communications, unhealthy competitive pressures[46] and the lucrative and inviting

[46] "In 1939 Pocket Books, Inc. issued the first ten titles in the new industry. That year saw a total of thirty-four titles and a sale of 1,508,000 copies. . . . Today there are approximately twelve hundred titles being published annually with a total annual sale of 300 million copies. As regards the relative rate of growth, in the period 1947-1954, newspaper circulation increased 14%, while books, measured in the number of

half-billion dollar pornographic trade.[47] Rip van Winkle comparisons are often ludicrous when placed in a different setting. The sands of time and unforseen developments have tempered the valuations of many great thinkers.[48] John Stuart Mill, if alive today, would recognize that we do not live in the relaxed calm of the steamboat era.

The very direct conflict of interest which existed in the case of the late Justice Curtis Bok, takes the sharp edge off the sword of ACLU's contemporary refer-

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copies sold increased 58%. . . ." Censorship, Government and Obscenity, by Terrence J. Murphy, *Helicon* Press, 1963, page 82.

[47]Margaret Caulkin Banning, novelist and feature writer, undertook a survey of newsstands for the Readers Digest Magazine. She concluded that, "Most of the newsstands of American do carry a display of sex provocation (in magazines and pocket books) such as to be found nowhere else in the world." She and her co-workers found that in a New York town of 20,000 population there were 1700 magazines which she termed "pictorial prostitution" sold every month. In larger cities in Massachusetts the sales were in about the same proportion. Report of the Select Committee on Current Pornographic Material, House of Representatives, House Report No. 2510, 82nd Congress, 2nd Session 1952, pages 65 to 66. Total cost to produce one popular magazine, that sells for fifty cents, is fifteen cents. A publisher of one such magazine started with an investment of 10,000 and within four years was grossing $3,500,000 a year. Report of the New York State Joint Legislature Committee studying the publication and dissemination of offensive and obscene material 123, 124. Legislative Document No. 85 New York (1958).

[48]Particularly is this so in judicial reasoning. Compare Mr. Justice Holmes' opinion in *Baltimore & Ohio Railway v. Goodman*, 275 U. S. 66 (1927) and his attempt to lay down a standard "once for all," which would require an automobile driver approaching a railroad with an obstructed view to stop, look and listen, and if he cannot be sure otherwise that no train is coming, to get out of the car, with Justice Cardoza's opinion seven years later in *Pokora v. Wabash Railroad*, 292 U. S. 98, 105 (1934), "Illustrations such as these bear witness for the need for caution in framing standards of behavior that amount to rules of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal."

ence;[49] nor can their reference to the comments of the American Law Institute, Model Penal Code, Tentative Draft No. 6, Section 207.10(2) be passed, without calling attention to Justice Bok's influence as a member of the Criminal Law Advisory Committee of the American Law Institute.[50] Except for isolated instances, this minority though vociferous voice has not been accepted

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[49]Justice Curtis Bok's mother was a member of the Board of Directors of the Curtis Publishing Company (which owned 42% of Bantam Books, Inc. stock) and the daughter of its founder. Judge Bok's brother was vice-president and director of the Curtis Publishing Company. The House of Representatives Report of the Select Committee on Pornographic Materials, December 1952, comments at page 7: "It is . . . reasonably possible that having been associated so closely with the publishing business that he became inherently imbued with a liberal conception of the tradition founded upon the constitutional provision guaranteeing the freedom of the press."

[50]Appellant urged the Ohio Supreme Court to reject the *Roth* test as "did the Supreme Court of the Commonwealth of Pennsylvania and the Court of Appeals of New York, . . . for the reason that it is unconstitutionally vague, and for the further reason that it is impractical and unworkable. . . ." See excerpt from said brief appearing in Appendix 10 of appellee's Motion to Dismiss Appeal, at page 67. The late Justice Bok of the Pennsylvania Supreme Court was a member of the ALI Criminal Law Advisory Committee, as also was Justice Fuld of the New York Court of Appeals. Both of these Justices are adherents to the dissenting opinion in *Roth* and have led the "silent revolution" against the existing standards in ruling case law.

Justice Bok's influence has been felt elsewhere. See the opinion of the late Justice Frank in *United States v. Roth*, 237 F. 2d 790 at page 805: "I then had little doubt about the validity of a purely punitive obscenity statute. But the next year in *Commonwealth v. Gordon* (1949), 66 Pa. Dist. & Co. R. 101 Justice Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that 'so far as I know' have never been answered, nudged me into the skeptical views contained in this opinion and in the Appendix." The overwhelming body of authority is contrary to the position which the drafters and these three judges were seeking to establish. See footnote 5.

into ruling case law. The results achieved, where the revolt has been successful, portend its downfall.[51]

ACLU's brief at page 16 reads, "Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted." (Our emphasis.) The "improbability of evil" thought to be so great, contemplates a self-controlling process in society similar to that accredited to the unrestricted economic market before social reform legislation, and assumes that society can flourish if freedom is protected absolutely. In his work, Zechariah Chafee[52] takes issue on this point and denies that there is a natural balance and harmony in society. The degree of order required for the healthy society is "not the inevitable consequence of freedom per se." In part it is the result of both political and moral effort. Both freedom and order are purchased by self-control *and* public controls.

Further, this statement is completely unsupportable. Its dishonesty is established by both ancient and modern historic fact. Ancient fact is found in the case histories out of which the obscenity statutes have been fashioned. Modern fact is represented by the groundswell of public indignation presently coursing throughout the nation. Its seriousness is tabulated in the workload of obscenity cases which are filling the court sys-

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[51]See the opinion of Justice J. Erwin Shapiro in *People v. Birch*, 243 N. Y. S. 2d 525 (Sept. 6, 1963) involving eight paperbacks, Sex Kitten, Clipjoint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch and College for Sinners. See also footnote 54.

[52]Zechariah Chaffee, Government and Mass Communication (Chicago: University of Chicago Press, 1947) 1, page 27.

tem.[53] This is not, employing a cliche of the literati, the result of "censorship by idiots". Leaders from all walks of life are calling out against the corrosive effects which are being felt in the communities, some of the most vociferous of which are voiced by well-known figures in the literary field (nor have they shut their eyes to the "silent revolution" being sponsored by a minority of the judiciary).[54] One well-known educator

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[53]Despite a filtering process, eight cases have reached this Court and are presently before it for review, October Term 1963, Nos. 11, 72, 95, 99, 246, 289, 330 and 449.

[54]"What is needed on the obscene scene is, in short, less double-talk about censorship and more court action on obscenity." "Paperback Pornography" by Cleveland Amory, Life Magazine 1963, pages 10-12. "Now for various reasons, some of them obviously commercial, eroticism flourishes in our society on a scale never before known, not even during the decadence of imperial Rome. . . ." Speaking Out by J. B. Priestly, Life Magazine 1963, pages 10-12.

"When Nikita Khrushchev visited Hollywood he was shown only one movie set, that of a wild dance scene in Can-Can. He said it represented decadence and I am sure he really thought so. It is a dogma of current Communist faith that America is Sodomon and Gomorrah, ripening for the kill. . . ." Finally there is the status of our entertainment and our literature. Can anyone deny that movies are dirtier than ever? But they don't call it dirt. They call it 'realism'. Why do we let them fool us? . . . ." Address by Jenkin Lloyd Jones editor of the Tulsa, Oklahoma Tribune. "Who is tampering with the soul of America?" Chicago, October 16, 1961. Reprinted in Wisconsin State Journal, October 29, 1961. "New York Supreme Court Justice J. Erwin Shapiro had before him a batch of books which he called, 'profane, offensive, disgusting and plain unvarnished trash.' But refused to call legally obscene. . . . Reluctantly Shapiro felt obliged to read some 25 pieces of lewd trash (Sex Kit, Hill-Billy, Nympho, etc.) and be their critic 'because the law in its present status required just that.' The books all had the same plot (which Shapiro described as 'from puberty to prostitution') . . . The Shapiro doctrine is too permissive and should not survive." "Is any Book Legally Obscene any more", Life Magazine, Sept. 27, 1963, page 8; "The untouchables in modern society are the writers, publishers and salesmen of smut. They have both the money and the opinion-makers on their side . . . and if it is perverted sex, and described fully the critical acclaim not only

has poignantly remarked that we are the first generation of Americans which has *permitted* its writers and playwrights to wallow in filth.[55]

The odor of pornography, which ACLU seeks to make an accepted brother of "free speech" by sterilizing the obscenity statutes, is giving that cherished freedom a monster-like appearance. The "sterling on silver" valuation this nation has always recognized in "free speech" as it relates to our culture, is beginning to take on a tarnished look, a debasing confusion never contemplated. Professor Hocking challenges the ACLU position,[56]

> "If I were personally to challenge one product of a noncontrolled liberty more than another, it would not be the liberty to confuse public debate, nor even the perverse liberty to breathe rancor in the world by maligning an ally or spreading international falsehoods; it would be the liberty to degrade, and especially to degrade the arts, which are man's only religion of self-elevation. I confess I am angry with the defilers of this religion, and still more angry when they bleat 'freedom of the

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hails it as art but as the product of genius. To communicate one's own sick pathology, especially if one is a pervert, is now regarded as the highest art form and the quickest entry into the genius sweepstakes. . . . Recent court rulings all over the country and from the lowest to the highest courts have decreed that anything goes. . . ." Inez Robb, Detroit Free Press, Nov. 6, 1963. "Nor can there be any real doubt that there is a close connection between the suddenness of the increase in sadistic crimes and the new vogue of sadism among mass media of entertainment. . . ." Walter Lippmann writing in New York Herald Tribune, September 7, 1954, page 18.

[55]Statement credited to Maxwell Rafferty, California State Superintendent of Public Instruction.

[56]Hocking, Freedom of the Press (Chicago: University of Chicago Press, 1947) page 192.

> press' to cover their treason. . . . If we reject the aid of the state as incompetent in these matters, we would seem bound to recognize of this common good we call culture that it is at once peculiarly defenseless against wanton assault by the more brutal individual impulses which still claim freedom. . . ."

To add "polish" to the standard is no invasion of free speech. To neglect the "polishing" process by encumbering the restraining processes of law in obscenity cases, as suggested by ACLU, is to damage "Free Speech" by making its presence less attractive.

B. The Ohio (Roth-Alberts) Standards Are Not Vague and Unworkable.

The *Roth* decision is clear that state obscenity statutes, which follow the constitutional standards set forth in that decision, are not vague.[57]

The criticism which has been levied against the *Roth* standards comes from the same small group who even before the *Roth* decision were leading the "silent revolution" away from ruling case precedent. In their view the people themselves are not qualified to speak on the community standards, but, for some unknown reason, the judges are. This is rule "by a bevy of Platonic

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[57] ". . . we hold that these statutes, applied according to the proper standard for judging obscenity, *do not* offend constitutional safeguards against convictions based upon protected material, or *fail to give men in acting adequate notice of what is prohibited.*" *Roth v. U. S.*, 354 U. S. 476, 492. (Our emphasis.) Appellant works this argument at both ends. Here they argued the standards are vague in determining "obscenity". They also argue the standards are vague in "conveying knowledge" to a person who has ascertained (is aware of) the content. It should follow that since the standards are not vague as to the former, they are not vague as to the latter.

guardians,[58] denounced by Judge Learned Hand. Judge Hand regarded the determination of "obscenity" as a jury question. Their dissatisfaction since Roth has been sounder in the semantics of interpretation and construction;[59] now it is a "vagueness" deficiency, next the "clear and present danger" deficiency; and if not one of these, then surely it is the "hard-core pornography" attack. It appears as a rare case indeed, when one of these interpretations is arrived at out of honest confusion.[60]

C. The Roth-Alberts Standards Do Not Limit the Proscription of State Obscenity Statutes to the Suppression of "Hard-Core Pornography" Only.

Appellant argues that the *Roth* test established "hard-core pornography" as the standard. ACLU's attack is more general, citing the same case material as appellant, but suggesting only that this Court has strictly limited

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[58]No more serious case of censorship can hardly be imagined. Not only do they choose to deny the people the right to "speak out" on community standards, but in their action they would settle this issue on a *majority* vote of the Platonic Guardians in preference to the *unanimous* decision required of the jury panel in the community.

[59]Leaders in this area are Professors Lockhart and McClure, referred to in the *Roth* dissent as "our outstanding authorities on obscenity". 354 U. S. 476, 510. See 38 Minn. L. Rev. 295 (1954) and 45 Minn. L. Rev. 5 where the *Roth* standard is energetically analyzed but not in sympathy with the majority opinion. The *Roth* standard is simple of understanding when applied as intended by Judge Learned Hand. (*i.e., ad hoc* legislation.)

[60]"There is no difficulty in distinguishing between books; the impulse behind which is literary and those whose impulse is pornographic. Any man with a modicum of literary knowledge can do so without hesitation. Huntington Cairns "Freedom of Expression in Literature" annals of American Academy of Political and Social Science. (November 1938) page 87.

obscenity *convictions*[61] by the lower courts. Our answer is that the *Roth* test does not establish such a standard, nor do the 1958 decisions referred to, stand for the proposition that the subject matter involved was not obscene.

Nowhere is the word "hard-core pornography" referred to in the majority opinion of *Roth v. U. S.*[62] The separate opinion of Justice Harlan referred to hard-core pornography, but only with reference to the federal authority, and that, because of his differing view as to the authority of the federal and state governments in the area of obscenity.[63]

The concept that only "hard-core" material is prohibited by *Roth-Alberts* is a seduction espoused by the Kronhausens and certain commentators, with roots entangled in an erroneous interpretation of the 1958 "per curiam reversals" of this Court.[64] Professors

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[61]Brief for Appellant, page 36. ACLU Brief, page 18 and footnote 12. The cases cited were not "convictions" as that term is understood in its primary sense (the ascertainment of guilt in a jury criminal proceeding). More properly, and important to their correct interpretation, they must be recognized as final *judgments* arrived at in civil proceedings, involving the more complex collateral issue of "prior restraint."

[62]Forgotten is the interpretation given *Roth* by the dissent of Justices Douglas and Black at page 512: "It creates a regime wherein the battle between the literati and the Philistines, the Philistines are certain to win. . . ."

[63]If Justice Harlan adheres to his views in *Alberts v. California*, 354 U. S. 476, 503, 506, appellant is concluded, having had his full day in the state court. Hard-core or not, that is not one of Justice Harlan's values in state cases.

[64]Certiorari was granted in four cases: *Times Film Corporation v. Chicago*, 355 U. S. 35 (movie, "The Game of Love"), *One, The Homosexual Magazine, v. Olesen*, 355 U. S. 371 (homosexual magazine); *Sunshine and Health and Sun Magazine v. Summerfield*, 355 U. S. 372 (nudist magazines); and *Mounce v. U. S.*, 355 U. S. 180 (nudist magazines, text in foreign languages). The cases were summarily reversed without

Lockhart and McClure write in 45 Minn. L. Rev. 5, 34, "In three of the four cases the Court must have made an independent examination of the materials and found that censorship of the materials violated constitutional requirements, for in these three cases the Court simply 'reversed' the court of appeals."

These commentators, whose views incline to the *Roth* dissent, saw no substantial issue other than the review by this Court of the issue of "obscenity". They regarded the materials as non hard-core, and the reversals on that ground. From this they argue that this Court must have been thinking "abstractly" of "hard-core pornography" when it spoke of "obscenity" in *Roth*. These three cases, however, involved substantial issues besides the obscenity issue. Both "obscenity" and "procedural due process" issues were involved, all of these being proceedings before an administrative body rather than criminal trials before the judiciary, as in *Roth-Alberts*.

Those decisions which have read the "hard-core pornography" concept into *Roth* have done so in reliance upon this misguided interpretation concerning the 1958 "per curiam reversals". Had Justice Desmond not misconstrued the 1958 *per curiam* decisions[65] in *People v. Richmond County News*, 175 N. E. 2d 681 (1961)

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argument. See Supreme Court Practice, Stern and Gressman, Sections 5-12 at pages 186-187 for factors to be considered in such cases.

[65]At page 688, Justice Desmond said in his opinion: "The inquiry for the court, therefore, is whether the publication is so entirely obscene as to amount to hard-core pornography. Virtuous adults will reject it (*as all of us judges would, were we not restrained by the Roth-Alberts legal test*). . . ." (Our emphasis.) His vote would have made the dissenting opinion, the majority opinion.

the "hard-core" rule would not have found its way into New York law.

In the 1958 *per curiam* reversals, the prior restraint impediments involved were major considerations which, together with the failure to try the issue of "obscenity" before the proper fact finder (to insure due process to the disseminator), make it impossible to assess any one reason for the Court's judgment in those cases. These hidden issues were not recognized until subsequent decisions were handed down *with opinions.*

A re-evaluation of the 1958 *per curiam* reversals is required after *Times Film Corporation v. Chicago,* 365 U. S. 667 (1961); *Marcus v. Kansas City Search Warrants,* 367 U. S. 717 (1961); *Manual Enterprise, Inc. v. Day,* 370 U. S. 478 (1962); and *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58 (1963). These opinions unearthed substantial factors[66] which were concealed when this Court decided the 1958 cases without opinion.

Times Film Corporation v. Chicago, 365 U. S. 667 (1961) unearthed two issues involved in the 1958 movie licensing case, *Times Film Corporation v. Chicago,* 2 L. Ed. 2d 72 (1958); the authority of the censor who acts outside the court-room (here the Chicago Movie Censoring Board) and, assuming such authority exists, the proper procedures to be employed. Justices Clark, Harlan, Frankfurter, Stewart and Whitaker held the power existed *if* proper standards (procedures) were employed. Justices Brennan, Warren, Black and Doug-

[66]The major issue involved on review appeared to be not the factual issue of whether the material was or was not obscene, but rather had the subject matter been exposed to the proper forum under proper procedures? Had the exhibitor had his full day in court? If this assessment is correct, then the *Roth* cases and all subsequent decisions are consistent.

las thought no such prior restraint power exists. This case suggests that the standards (procedures) employed in the 1958 *Times Film* case were bad.[67]

Marcus v. Kansas City Search Warrants, 367 U. S. 17 (1961) unearthed another factor involved in the 1958 federal postal cases. In the *Marcus* case a long delay was involved after a mass seizure under a general search warrant. This Court revealed for the first time it would enter a reversal as a penalty even though the material might be obscene.[68] Where a censor acts outside the court-room and where proper procedural safeguards are not adhered to, this Court will not even get to the "obscenity" issue. In such a situation, this Court did not equate "obscene" matter to heroin (contraband). This explains the return of the materials in the 1958 cases.

Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) discussed another issue which lay dormant in the two 1958 decisions which involved the postmaster—the authority of the postmaster censor who acts outside the

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[67]A review of the procedures under the Chicago ordinance set forth in the opinions of the lower federal courts, 139 F. Supp. 837 (1956) and 244 F. 2d 432 (1957) and in the more recent case, *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785 (1961), involving "The Lovers", indicates the procedures very likely were bad under judicial standards and that this was the primary reason for the 1958 reversal. The Chicago ordinance was revised on December 27, 1961 as a result of the *Zenith* decision. See the article, "Obscenity, Pornography and Censorship", by Thomas R. Mulroy of the Illinois Bar appearing in American Bar Association Journal, September 1963.

[68]At page 1140: "*We have no occasion to reach the question of the correction of the finding that the publications are obscene.* . . Since a violation of the Fourteenth Amendment infected the proceeding, in order to vindicate appellant's constitutional rights, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." (Our emphasis.)

court-room. Justices Brennan, Warren and Douglas thought a postmaster had no such power under the federal statutes. Justices Harlan, Stewart and Clark felt the power existed.

In *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58 (1963) this Court made it clear that the proper method of controlling "obscenity" was by criminal prosecution.[69] (The weakness of the 1958 cases—the 1958 *per curiam* reversals were not criminal prosecutions. They involved civil actions forced upon the disseminator.)

The use of "hard-core pornography" in preference to the more widely understood term "obscenity" can serve no purpose other than to compound what appears to be seeming confusion but is, in reality, a continuing struggle between those who support "case precedence" and those who support the "silent revolution". Whether material is pornography or obscenity is a matter of semantics. No clearer example of this can be had than by studying the case histories of Tropic of Cancer in the California and in the New York courts.[70]

The court below said in describing "The Lovers." "Les Amants" was not hard-core pornography, *i.e.*,

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[69]"In thus obviating the need to employ criminal sanction, the state has at the same time eliminated the safeguards of the criminal process. *Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process.*" (Our emphasis.)

[70]While the California statutes has been interpreted to codify the *Roth* decision, the California Supreme Court in a 7-0 decision held Tropic of Cancer not to be obscene because not "hard-core pornography." In New York where the "hard-core pornography" rule is said to be the law, independent of Roth, the New York Court of Appeals in a 4-3 decision held Tropic of Cancer to be obscene, because it was "hard-core pornography."

filth for filth's sake. *It was worse.* It was filth for money's sake. The producers, distributors and exhibitors *exhibited so little responsibility in connection therewith* that they have no right to assert constitutional guarantees which require a high degree of responsibility from those who seek their protection." (Our emphasis.) This is no less than a statement by the court that the film was so clearly obscene the court considered the proffered claim of non-obscenity to be a sham.

VI.

The Determination of "Obscenity" Is Primarily an Issue of Fact to Be Tried by a Jury (Unless Waived. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Could Differ Beyond a Reasonable Doubt That 'The Lovers' Is Obscene."

A. The Determination of "Obscenity" Is Primarily an Issue of Fact to Be Tried by a Jury.

The pre-Roth precedents, and the Roth test, by its very definition, pose a factual (jury) question.

Historically the "constitutional standard" expressed by Justice Brennan in *Roth* had its genesis in an opinion written by Judge Learned Hand, *United States v. Kennerley,* 209 Fed. 119 (S. D. N. Y. 1913), often called the "architect" and "father" of modern obscenity law.[71] In that decision, Judge Learned Hand disap-

[71] Twenty-one years later in *United States v. One Book Entitled Ulysses by James Joyce,* 72 F. 2d 705 (1934), a two-to-one decision in the Circuit Court of Appeals, Second Circuit, Judge Learned Hand joined with Judge Augustus Hand to establish "dominant effect" as one of the measuring sticks for obscenity in a case of major importance. The decisions in between *Kennerley* (1913) and *Roth* (1959) which used the "average man" and "predominant appeal" test cite Judge Learned Hands' early decision in *Kennerley.*

proved of the rule in *Regina v. Hicklin*, L. R. 3 Q. B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question.[72]

Kennerley's general demurrer to a federal indictment for placing an obscene book in the mails raised the question whether the issue of "obscenity" as applied to the book "Hagar Revelly"[73] was a question of fact for the jury or a question of law for the Court. Judge Hand, in overruling the demurrer and requiring Kennerley to stand trial, ruled that the "obscenity" issue was for the jury to decide.[74]

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[72]At page 121,

". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. . . .

"Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctly from life and common speech." (Our emphasis.)

[73]The book was made a part of the record by a Bill of Particulars and by stipulation. Kennerley's demurrer raised the question *before* the actual criminal trial as to whether the book was obscene. The question is raised in this case *after* the criminal trial and *full state court review* of the motion picture film. The test should be the same.

[74]At page 120,

"Whatever be the rule in England, in this country the *jury* must determine under instructions whether the book is ob-

Judge Learned Hand, speaking for the Circuit Court of Appeals in *United States v. Levine* (1936), 83 F. 2d 156, 157, in a criminal prosecution for mailing obscene circulars, called the verdict on "obscenity," a "small bit of legislation *ad hoc*, like the standard of care" which the court imposes upon a jury as a "duty."[75]

Justice Brennan confirmed the pre-*Roth* precedents in his majority opinion in *Roth v. United States* (*supra*)[76] and in his separate opinion in *Kingsley Book Inc. v. Brown*, 360 U. S. 684 (1957),[77] pointing out

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scene. The court's *only power* is to decide whether the book is so clearly innocent that the *jury* should not pass upon it at all. . . ." (Our emphasis.)

[75]The *Levine* case was cited in *Roth* at footnote 26 as consistent with the obscenity law expressed therein. Learned Hand said in *Levine* at page 157,

"'As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury (Rosen v. United States, supra*, 161 U. S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really *a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

[76]Justice Brennan, speaking for the majority, cited with approval a jury instruction given in the *Roth* prosecution in the trial court, at page 1510, to the effect that "In this case, ladies and gentlemen of the jury, you and you alone are the *exclusive* judges of what the common conscience of the community is. . . ." (Our emphasis.) In the companion criminal case of *Alberts v. California*, both the People and the defendant had waived their right to trial by jury.

[77]At page 1478, "in *Alberts v. California*, and *Roth v. United States*, decided today, 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. . . .

that the constitutional standard for judging obscenity, by its definition, calls for a jury trial and a factual determination.

B. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Could Differ Beyond a Reasonable Doubt That 'The Lovers' Is Obscene."

The constitutional inquiry should look only to the "reasonableness" of the factual determination, *i.e.*, "whether reasonable minds might differ that the material is obscene."

Pre-Roth case law provides absolutely no support for expanded review by the Federal Courts. See here a host of cases to the contrary appearing in the extensive annotation following *United States v. Limehouse*, 285 U. S. 426 (decided April 11, 1932), entitled "Respective Functions of Court and Jury in Determining Criminality vel non of Matter." In *Kennerley* (*supra*) Judge Hand said, "The court's *only power* is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States v. Clark* (D. C.), 38 Fed. 500; *United States v. Smith* (D. C.), 45 Fed. 478. The same question arises as would arise upon motion to direct a verdict at the close of the case. . . . The question here is, therefore, whether the jury might find the book obscene under proper instructions."[78] (Our emphasis.)

"The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, *by its definition*, calls for an appraisal of material according to the average person's *application* of contemporary community standards. . . ." (Our emphasis.)

[78]209 Fed. Rptr. 119, 120.

The reporter's notes to the 1957 draft of the A. L. I Model Penal Code record at page 16 the results reached in prior case law:

> "13. *Obscenity As Fact or Law; Role of Court.* Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty. ***Any tendency to stray from this line has been in the direction of authorizing the court, where there is no dispute as to the content of the material, to instruct the jury that it is obscene as a matter*** of law. . . ." (Our emphasis.)

Justice Brennan, author of the majority opinion in *Roth* stated his view very clearly in *Kingsley Book, Inc. v. Brown*, 360 U. S. 684 (1957), that in reviewing the subject matter, before a trial of the issue, the Court merely satisfied itself a jury question was present, *i.e.*, that "reasonable men may differ whether the material is obscene."[79] Whether the court's "review" takes place before trial of the issue in a declaratory judgment civil action (as in *Kingsley Book Inc. v. Brown, supra*), or in the "review" of a state conviction after a criminal obscenity prosecution (as in this case), the scope of

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[79]This seems to be the same test applied by Judge Learned Hand. See note 74. Justice Harlan alone of this present Court has voiced an inclination to learn beyond this. See Justice Stewart's opinion in *Volanski v. United States*, 246 F. 2d 842, 845. Even Justice Black in *Kingsley v. Regents of University of New York*, 360 U. S. 684, 689, voiced the opinion that if censorship was to be the rule, the United States Supreme "Court is about the most inappropriate Supreme Board of Censors that could be found. . . ."

"review" should be the same, *i.e.*, "whether reasonable minds might differ that the material is obscene."

The reasoning behind the limited review seems apparent; by definition the *constitutional standard* depends upon an appraisal of material by a jury—the average person's application of contemporary community standards. The Seventh Amendment[80] to the Federal Constitution precludes a *Federal Court*[81] from re-examining these facts which are tried by a *jury* in a state court.[82]

The public policy supporting limited review in the area of "obscenity" is even more apparent. Judge Learned Hand viewed the court's usurpation of this inherent right of the People as an evil, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them

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[80]". . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Amendment VII (1791) of the Constitution of the United States.

[81]The right of a state court to reexamine jury determinations may be greater than the right of a federal court to reexamine the same jury determinations (the federal court is bound by the state court's interpretation of the state statute), see *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, (footnote 82). See also *Bradley Reed Smith v. California*, October Term, 1963, No. 72, remanded to the Los Angeles Superior Court on Dec., 16, 1963 for consideration in the light of *Zeitlen v. Arnebergh*, 31 Cal. Rptr. 800. Tropic of Cancer remains outside the protection of the First Amendment in the State of New York by virtue of this Court's action in the *Bradley Reed Smith* case (a jury determination).

[82]"It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 240.

which I assuredly do not. . . . ."[83] Judge Learned Hand gave insight to his decisions, which restricted the role played by the courts in measuring what is obscene. "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."[84]

Justice Harlan's view that "the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind," is no comfort to appellant in this case because of Justice Harlan's differing approaches to state and federal cases. This review involves an Ohio conviction which has been given the full support of that sovereign state's judicial system.

Appellant chose to follow the pattern followed by most defendants in obscenity cases[85] and waived his right to a trial of the facts by a jury. That the trial judges performed the dual role of trying both law and fact should not permit the respective functions

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[83]Hand, the Bill of Rights, Harvard University Press (1958), at page 73.

[84]*Id.* at p. 72.

[85]45 Minn. L. R. 5, 109, fn. 596.

of the jury and the court to take on aberrations and remain out of focus on appeal. That the issue of "obscenity" was tried by a three judge court should not confer upon appellant any rights greater than those accorded to him under a jury trial."

Conclusion.

The order appealed from should be affirmed as set forth in this brief.

Respectfully submitted,

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